

BEFORE THE  
GOVERNING BOARD  
LOST HILLS UNION SCHOOL DISTRICT  
COUNTY OF KERN  
STATE OF CALIFORNIA

In the Matter of the Layoffs Of:

Sabrina Reimert and Laura E. Wanke,  
  
Respondents.

Case No. 2012030510

**PROPOSED DECISION**

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 25, 2012, in Bakersfield, California.

Peter Carton, Attorney at Law, represented Jerry Scott (Scott), Superintendent of the Lost Hills Union School District (District).

Paul A. Welchans, Attorney at Law, represented Respondents Sabrina Reimert (Reimert) and Laura Wanke (Wanke), collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents and other certificated employees of the District notice of its intent not to reemploy them for the 2012-2013 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2012-2013 school year.

Oral and documentary evidence, and evidence by oral stipulation on the record, was received at the hearing, and the matter was submitted for decision.

**FACTUAL FINDINGS**

1. Superintendent Scott filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District.
3. On February 7, 2012, the Governing Board of the District (Governing Board) adopted Resolution number 2012-02-07A, reducing self-contained classroom instruction by three full-time-equivalent (FTE) positions and special education services by one FTE for the 2012-2013 school year.

4. On February 24, 2012, the District provided notice to Respondents that their services will not be required for the 2012-2013 school year due to the reduction of particular kinds of services.

5. On February 29, 2012, Respondents requested a hearing to determine whether there is cause for not reemploying them for the 2012-2013 school year.

6. On March 26, 2012, the District issued the Accusation, the Notice of Hearing, and other required documents, and served them on Respondents. Respondents thereafter filed timely Notices of Defense.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 3 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code<sup>1</sup> section 44955.

9. The Governing Board's decision to reduce or discontinue the particular kinds of services is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

10. The reduction or discontinuance of services set forth in factual finding number 3 is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

11. On February 7, 2012, the Governing Board adopted Resolution number 2012-02-07, setting forth the criteria to determine seniority among employees who first rendered paid service in a probationary position on the same date (tie-breaking criteria). The specific criteria were listed, not necessarily in order of importance as: credentialing; experience, extracurricular activities, training, special education needs, competence, and evaluations. The District did not find it necessary to utilize the tie-breaking criteria in implementation of the reductions in force authorized by the Governing Board.

12. Respondent Wanke has a seniority date of August 4, 2009, and is a permanent employee of the District. She holds a clear multiple subject credential, and teaches fourth grade.

13. a. Respondent Wanke, through counsel, asserts that the District retained a certificated employee, Alejandro Esquivel (Esquivel), who, by virtue of his employment in a categorical program, is not a permanent employee of the District or, alternatively, is not more senior than Wanke.

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<sup>1</sup> All further statutory references are to the Education Code.

b. The District first employed Esquivel for the 2003-2004 school year, pursuant to a contract, which stated that “This employment is created pursuant to Education Code Section 44909. Services to the District in the program for which you have been employed is [sic] temporary and subject to the availability of categorical funds for the funding of your position. . . .” (Exhibit C, at p. 1.) At the end of the school year, Esquivel received a “Confirmation of Cessation of Temporary Employment Status,” terminating his employment.

c. The District rehired Esquivel for the 2004-2005 school year, but he was not offered a contract of employment. His employment was again terminated at the end of the school year, pursuant to another “Confirmation of Cessation of Temporary Employment Status” notice.

d. Esquivel was rehired for the 2005-2006 school year. He was not offered a written contract of employment. Esquivel has continued to work for the District since then, and he did not receive a termination or nonreelection notice at the end of any school year after the 2004-2005 school year. Although the District argued in its brief that Esquivel separated from employment at the end of the 2005-2006 school year, no evidence was presented to establish such fact, and, as set forth below, District records show that he has been employed since 2004.

e. The District’s business office generated a “Salary Placement Schedule” form for each year Esquivel has been employed. The form was used to obtain approval for payment of Esquivel’s salary, and, in addition to other salary and benefit information, the form lists his purported “years of service.” For the 2004-2005, 2005-2006, 2006-2007, 2007-2008, and 2008-2009 school years, the years of service were listed as “0.” Years of service were listed as “1” in the 2010-2011 school year Salary Placement Schedule form, and as “2” in the current school year. The seniority list prepared just before layoff notices were issued, dated February 27, 2012, lists Esquivel as having a “categorical” status employment contract.

f. Esquivel worked pursuant to a preliminary multiple subject credential until he obtained a clear multiple subject credential on August 28, 2008. During his entire tenure, Esquivel has worked in categorically funded programs intended to help the children of migrant farmworkers. The program in question will continue in effect for the 2012-2013 school year.

g. Jackie Villa (Villa), administrative assistant to Superintendent Scott, testified that Esquivel was deemed to be a permanent employee upon the realization that the District had failed to offer him a written contract of employment for the school years after 2004-2005. He has been assigned a seniority date of August 8, 2006.

14. Respondent Reimert has a seniority date of August 29, 2011, and holds a preliminary multiple subject credential. She teaches Fourth Grade. She is the most junior elementary school teacher laid off.

15. No certificated employee junior to Respondents Reimert and Wanke was retained to render a service which either Respondent is certificated and competent to render.

### LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 3 are particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 3 and 8.

3. Cause exists under Education Code sections 44949 and 44955 for the District to reduce or discontinue the particular kinds of services set forth in factual finding number 3, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 10.

4. The District has classified Esquivel as a permanent employee and has assigned him a seniority date of August 8, 2006. The District maintains that its failure to provide Esquivel with a temporary contract upon his rehire in 2006 rendered him a tenure-track probationary employee, who by operation of law became permanent at the start of the 2008-2009 school year. Respondent Wanke asserts that Esquivel is junior to her by virtue of his employment in a categorical program. Alternatively, she argues, even if Esquivel is a permanent employee he shares the same seniority date with Respondent Wanke and the District should have applied its tie-breaking criteria to retain the most senior employee.

Initially, the District asserts that it is not required to staff categorically-funded programs with employees hired pursuant to section 44909, a permissive statute, and that it did not hire Esquivel pursuant to this statute. In pertinent part, section 44909 provides: “The governing board of any school district *may* employ persons possessing an appropriate credential as certificated employees in programs and projects to perform services conducted under contract with public or private agencies, or categorically funded projects which are not required by federal or state statutes. *The terms and conditions under which such persons are employed shall be mutually agreed upon by the employee and the governing board and such agreement shall be reduced to writing.* Service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee unless (1) such person has served pursuant to this section for at least 75 percent of the number of days the regular schools of the district by which he is employed are maintained and (2) such person is subsequently employed as a probationary employee in a position requiring

certification qualifications. Such persons may be employed for periods which are less than a full school year and may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees other than Section 44918. [¶ ] Whenever any certificated employee in the regular educational program is assigned to a categorically funded project not required by federal or state statute and the district employs an additional credentialed person to replace that certificated employee, the replacement certificated employee shall be subject to the provisions of Section 44918.” (Emphasis added.)

As the plain language of section 44909 makes clear, and as the District correctly points out, the statute does not require, but, rather, permits, a district to hire temporary employees to staff its categorical programs. Moreover, as the highlighted sentence requires, the employee must indicate his/her assent in writing. Here, there is no credible evidence that Esquivel was hired pursuant to this statute. His designation on an earlier seniority list as “categorical” is insufficient to establish his employment status. The list is a secondary source of information and is only correct to the extent that the information used to create the list is correct. As Villa testified, Esquivel’s designation as a categorical employee on the seniority list was in error. Nor is a designation on the salary placement financial forms controlling. Neither type of document shows the parties’ mutual intent that Esquivel’s employment would be pursuant to section 44909. Accordingly, Esquivel was not hired pursuant to section 44909, and, therefore, any limitation contained in the statute to his attainment of permanent status is not applicable to him.

5. The Education Code permits certificated employees to be classified in one of four ways: permanent, probationary, substitute, or temporary. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916 (*Kavanaugh*).) A certificated employee is classified as permanent, i.e., acquires tenure, if, after having been employed for two complete successive school years in a position requiring certification qualifications, he or she is reelected for the following year. (§ 44929.21, subd. (b); *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260, 1278-1279 (*Bakersfield*).) Probationary employees are “those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees.” (§ 44915.) “[S]ection 44915 has been understood to make probationary status the default classification for certificated employees who are not otherwise required by the Code to be classified as permanent, substitute, or temporary employees. [Citations].” (*Bakersfield, supra*, 145 Cal.App.4th at p. 1281.) Substitutes are “those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. . . .” (§ 44917.) Temporary employees are those requiring certification qualifications, other than substitute employees, who are employed for limited assignments, as defined in the Code, such as in sections 44918, 44919, 44920, and 44921. (*California Teachers Association v. Vallejo City Unified School District* (2007) 149 Cal.App.4th 135, 146 (*Vallejo*).)

The seniority date of a certificated employee is defined as the date the employee “first rendered paid service in a probationary capacity.” (§ 44845.) If a certificated employee is misclassified as a temporary teacher, or if the date on which the employee first rendered paid service in a probationary capacity is otherwise incorrect, the employee’s seniority date may need to be adjusted to reflect the earlier first date of probationary service. (*Bakersfield, supra*, 145 Cal.App.4th at p. 1273.)

In *Kavanaugh*, *supra*, the Supreme Court held that an employee who was not given written notice on her first day of paid service for the district that her employment was as a temporary employee, as required by section 44916, became a probationary employee by operation of law. Similarly, the District’s failure to tender a contract to Esquivel designating a status other than probationary employment resulted in his hiring by the default classification of probationary employee.

6. Once hired as a probationary employee, the District had to issue a notice of nonreelection to prevent Esquivel from becoming a permanent employee. (§ 44929.21, subd. (b); *Bakersfield, supra*, 145 Cal.App.4th 1260, at pp. 1278-1279.) It did not do so, and Esquivel acquired permanent status. While the District contends that Esquivel separated from employment at the end of the 2005-2006 school year and was rehired at the start of the 2006-2007 school year, no evidence was presented to establish such fact. Nevertheless, it is unnecessary to establish Esquivel’s exact seniority date to determine the order of termination between him and Respondent Wanke for the purpose of the instant proceeding, as even the later seniority date assigned to him by the District gives him greater seniority than Wanke, August 8, 2006 versus August 4, 2009.

7. Cause exists to terminate the services of Respondents Reimert and Wanke, by reason of factual finding numbers 1 through 15, and legal conclusion numbers 1 through 6.

#### ORDER

The Accusation is sustained and the District may notify Respondents Reimert and Wanke that their services will not be needed during the 2010-2011 school year due to the reduction of particular kinds of services.

DATED:\_\_\_\_\_

SAMUEL D. REYES  
Administrative Law Judge  
Office of Administrative Hearings